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Nos. 430, 506

In the Supreme Court of the United States

OCTOBER TERM, 1957

HORACE BANTA, TRUSTEE OF THE PROPERTY OF THE NEW JERSEY AND NEW YORK RAILROAD COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

MOTION TO DISMISS AND MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
VICTOR R. HANSEN,
Assistant Attorney General,
CHARLES H. WESTON,
W. LOUISE FLORENCOURT,
Attorneys,
Department of Justice, Washington 25, D. C.

ROBERT W. GINNANE,
General Counsel,
B. FRANKLIN TAYLOR, JR.,
Assistant General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

INDEX

	Page
Statement	2
Argument	3
Conclusion	10

CITATIONS

Cases:

Alabama Public Service Commission v. *Southern Ry. Co.*, 341 U. S. 341 8

Baltimore & Ohio R. Co. v. *United States*, 277 U. S. 291 4

Houston & Texas Ry. v. *United States*, 234 U. S. 343 5

New Jersey & N. Y. R. Co., In re 23 N. J. Super. 1; 12 N. J. 281 2

Kansas City Southern Ry. Co. Application, 94 I. C. C. 691 3

Missouri Pacific R. Co. v. *Norwood*, 42 F. 2d 765 7

Missouri Pacific R. Co. v. *Norwood*, 283 U. S. 249 8

New York Central R. Co. Abandonment, 254 I. C. C. 745 3

North Carolina v. *United States*, 325 U. S. 507 7

Palmer v. *Massachusetts*, 308 U. S. 79 3

Statute:

Interstate Commerce Act, 49 U. S. C. 1, *et seq.*:

Section 1 (17) 4

Section 3 (1) 2, 9, 10

Section 13 (4) 2, 6

Miscellaneous:

58 Cong. Rec. 8309–8318 6

58 Cong. Rec. 8317 6

59 Cong. Rec. 117–147 6

H. Rep. 456, 66th Cong., 1st Sess. 6

H. Rep. 650, 66th Cong., 2d Sess. 6

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Pursuant to Rule 16, paragraphs 1 (a) and 1 (c) of the Revised Rules of this Court, appellees move that the appeal in No. 430 be dismissed, and that in No. 506 the judgment of the district court be affirmed.

On May 13, 1957, the district court rendered an opinion holding that appellant's complaint, which attacked the validity of an order of the Interstate Commerce Comission, should be dismissed, but judgment of dismissal was not entered until September 5, 1957. On July 10, 1957, appellant filed a notice of appeal from what it referred to as a "decision and

final order", and this appeal has been docketed as No. 430. Since this appeal was taken prior to entry of judgment, it plainly should be dismissed.

Following entry of final judgment, appellant filed a second notice of appeal on September 20, 1957. This appeal has been docketed as No. 506, and the Government concedes that this Court has jurisdiction of the later appeal. The Government also has no objection to grant of appellant's motion to use in No. 506 the record and jurisdictional statement filed in No. 430.

STATEMENT

Appellant, trustee in bankruptcy of the New Jersey & New York Railroad Company, brought the present action to set aside an order of the Interstate Commerce Commission which had dismissed a petition requesting an investigation by the Commission to determine whether the railroad's service within New Jersey performed by one passenger train (Train No. 613) operating between Jersey City, New Jersey, and Spring Valley, New York, constituted a violation of Section 13 (4) or Section 3 (1) of the Interstate Commerce Act. Prior to such petition, the Board of Public Utilities Commissioners of New Jersey had denied appellant's [1] application for permission to discontinue operation of Train 613 within the State of New Jersey, the State courts had upheld the Board's order,[2] and this Court had dismissed an appeal from

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[1] Appellant and the New York & New Jersey Railroad will be collectively referred to as "appellant".

[2] *In re New Jersey & N. Y. R. Co.*, 23 N. J. Super. 1; 12 N. J. 281.

the Supreme Court of New Jersey for want of a substantial federal question (346 U. S. 868).

The Commission found that appellant's passenger service covered a distance of about 31 miles, of which 25 miles were in the State of New Jersey and 6 in the State of New York; that its entire operations had been conducted at a loss during recent years; and that operation of Train 613 resulted in an out-of-pocket loss of more than $30,000 a year (J. St. 30–31).[3] The Commission concluded that Section 13 of the Act gave it no authority to investigate or deal with intrastate passenger service (J. St. 35–40), and that continued operation of Train 613 was not a violation of Section 3 (1) of the Act (J. St. 40–41). The district court, in an opinion by Circuit Judge Goodrich, unanimously upheld the Commission's conclusions (J. St. 19–26).

ARGUMENT

1. The Commission is not empowered to authorize or prevent mere curtailment or partial discontinuance of interstate train service.[4] It would therefore be highly anomalous if the Act gave the Commission power to authorize or prevent curtailment or partial abandonment of intrastate service.[5] The anomaly

[3] We use the designation "J. St." to refer to the jurisdictional statement filed in No. 430.

[4] *Palmer* v. *Massachusetts*, 308 U. S. 79, 84–85; *Kansas City Southern Ry. Co. Application*, 94 I. C. C. 691; *New York Central R. Co. Abandonment*, 254 I. C. C. 745, 765.

[5] As the jurisdictional statement points out (p. 3, note), the only dispute in this case relates to the proposed curtailment of intrastate service in New Jersey, a proposal vetoed in the first instance by the New Jersey Board.

in a grant of such power is heightened by the proviso of Section 1 (17) of the Act, which indicates that Congress intended to preserve State control over intrastate service absent express statutory authorization for federal regulation thereof.*

Appellant contends (J. St. 7–13) that Section 13 (4) of the Interstate Commerce Act authorizes the Commission to prohibit any unprofitable intrastate train service required by order of a State regulatory body, because such service is a "practice" or "regulation" within the meaning of that section. The section provides that if the Commission finds that any "rate, fare, charge, classification, regulation, or practice", imposed by authority of any State, discriminates against interstate commerce, the Commission shall prescribe the rate, fare or charge thereafter to be charged, or the classification, regulation or practice thereafter to be observed, which will remove such discrimination.

In *Baltimore and Ohio R. Co.* v. *United States*, 277 U. S. 291, 299–300, this Court, in dealing with the meaning of the word "practice" as used in the Interstate Commerce Act, said:

> The word "practice," considered generally and without regard to context, is not capable of useful construction. If broadly used, it would cover everything carriers are accustomed

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*The Section 1 (17) proviso states that "nothing in this part shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this part."

> to do. Its meaning varies so widely and depends so much upon the connection in which it is used that Congress will be deemed to have intended to confine its application to acts or things belonging to the same general class as those meant by the words associated with it.

The Commission and the court below concluded that both the language and the legislative history of Section 13 (4) show that the section is confined to disparity between interstate and intrastate rates and charges causing discrimination against interstate commerce or undue advantage, preference or prejudice as between persons or localities in interstate commerce and those in intrastate commerce. The Commission and the court below therefore held that the words "practice" and "regulation", as used in Section 13 (4), apply only to acts of the same character as that denoted by the words associated with it, that is, a discriminatory relationship between intrastate and interstate rates.

Legislative history makes it clear that Congress added subsections (3) and (4) to Section 13 of the Act solely in order to write into the statute and to implement the decision of this Court in what is known as the *Shreveport* case, *Houston & Texas Ry.* v. *United States*, 234 U. S. 343. The questions there decided, as the Court repeatedly declared, were the power of Congress and the statutory authority of the Commission to deal with the *relation* of intrastate rates to interstate rates when the relationship was such as to cause discrimination against interstate commerce. 234 U. S. at 354, 355, 358. We cite below

references showing Congressional intent,[1] one example of which is the following statement by the Chairman of the House Committee on Interstate and Foreign Commerce speaking to the House (58 Cong. Rec. 8317):

> We also provide for the enactment into law of what is popularly known as the decision of the Supreme Court in the Shreveport case. Where intrastate rates constitute an undue burden, advantage, preference, or prejudice against interstate rates, such rates are declared to be unlawful. We have incorporated into law the decision of the court. When by reason of the low level of the intrastate rates an undue burden is cast upon the interstate traffic the citizens and the shippers of other States are compelled to pay higher interstate freight rates than they would have had to pay had that State enacted or put into force and effect proper intrastate rates.

In its broadest sense, the word "practice" is applicable to rail operations of almost every kind. Adoption of appellant's view of the scope of Section 13 (4) would mean that the Interstate Commerce Commission has power to prohibit practically any type of intrastate rail service conducted at a loss. Obviously the section, so interpreted, would greatly curtail state

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[1] Report of the House Committee on Interstate and Foreign Commerce to accompany H. R. 10453 (H. Rep. No. 456, 66th Cong., 1st sess.); Report of the Conference Committee to accompany H. R. 10453 as amended (H. Rep. No. 650, 66th Cong., 2d sess.); explanations of H. R. 10453 and S. 3288 by the chairmen of House and Senate Committees before their respective Houses sitting as Committees of the Whole (58 Cong. Rec. 8309–8318; 59 Cong. Rec. 117–147).

regulatory power. Even in cases where the Commission unquestionably has authority to act under Section 13 (4), this Court, recognizing that intrastate transportation "is primarily the concern of the state", has declared that Commission orders directed at intrastate rates "must meet a high standard of certainty" and justification for "exercise of the federal power must clearly appear." *North Carolina* v. *United States*, 325 U. S. 507, 511, and cases there cited.

Finally, we submit that this Court has already ruled adversely to appellant's construction of Section 13 (4). *Missouri Pacific R. Co.* v. *Norwood*, 42 F. 2d 765 (W. D. Ark.), was a suit attacking the validity of the Arkansas "full-crew" statutes governing freight train operations. The grounds of attack were that the state laws violated the due process clause of the Fourteenth Amendment and that Congress had, by virtue of the Interstate Commerce Act, fully occupied the field. The three-judge district court fully considered plaintiff's contention that the state requirements, alleged to impose unnecessary and unreasonable expense, constituted a "practice" which the Commission, under Section 13 (4), had authority to prohibit. The court, after reviewing the section's legislative history, held the section not applicable to the state full-crew statutes, both because the words "regulation, or practice" as used in that section did not embrace matters totally unrelated to state-fixed rates, and because the state statutes did not discriminate in favor of intrastate commerce as against interstate commerce since "all commerce is equally affected and in the same manner." 42 F. 2d at 770–772. This Court unanimously affirmed the dis-

trict court's decision. *Missouri Pacific R. Co. v. Norwood*, 283 U. S. 249. The Court, citing Section 13 as one of the sections upon which appellant relied, stated that the word "practice" is not used in the Interstate Commerce Act "in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such [freight train] crews". 283 U. S. at 257.

From the standpoint of the application of Section 13 (4), we submit that state requirements as to the composition of crews of freight trains and a state requirement that a particular train serving intrastate passengers be kept in operation, stand on the same footing.

Appellant relies upon a footnote to the Court's opinion in *Alabama Public Service Commission* v. *Southern Ry. Co.*, 341 U. S. 341, n. 9 at 346–347 (J. St. 7–8). In that case, the railroad brought suit in a federal court to enjoin enforcement of an order of a state regulatory commission which prohibited discontinuance of certain intrastate passenger service. This Court reversed a judgment granting such relief upon the ground that, since adequate state court review of the attacked order was available to the railroad, federal court intervention was neither necessary nor proper. 341 U. S. at 349–350. The footnote relied upon merely states that the impact of the state order upon interstate commerce could not be considered because the Commission's jurisdiction under Section 13 (4) had not been invoked. Since the basis of suit was an alleged unconstitutional taking of property without due process, in that the required passenger service

was conducted at an out-of-pocket loss, discrimination against interstate commerce forbidden by Section 13 (4) was outside the issues in the case. Furthermore, the Court did not say, even by way of dictum, that the state order could have been attacked under Section 13 (4); all that it said was that no proceeding under that section had been instituted.

2. Appellant also contends (J. St. 13–18) that continuance of the intrastate passenger service required by the state order violates Section 3 (1) of the Act. This section makes it unlawful for a railroad to subject "any particular person, * * * locality, * * *, or any particular description of traffic" to unreasonable prejudice or disadvantage. The court below said (J. St. 25): "We cannot see how the action" of the state Board "in refusing to allow the railroad to give up the train in question discriminates against anyone." The Commission ruled against appellant's contention as follows (J. St. 41):

> In so far as the respondent's [appellant's] theory rests upon the threat to interstate passengers and shippers of increased rates and fares required by the dissipation of respondent's revenues by State-required running of alleged needless passenger trains, it goes beyond the purview of personal or local prejudice. In any event, there is upon this record no evidence upon which it could be found that intrastate passengers or localities are preferred and interstate passengers or localities are prejudiced.

Appellant's suggestion that there is a discrimination against interstate riders of the train because they do not have, while intrastate riders do have, legal

assurance of continued service is, as the court below said, a suggestion of prejudice or disadvantage by reason of "what probably will never come to pass" (J. St. 25). In addition, Section 3 (1) plainly does not encompass prejudice or disadvantage of such a tenuous character.

CONCLUSION

For the foregoing reasons, we submit that the decision below is clearly correct and that this case presents no substantial question. The appeal in No. 430 should be dismissed, and in No. 506 the judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

CHARLES H. WESTON,
W. LOUISE FLORENCOURT,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

B. FRANKLIN TAYLOR, JR.,
Assistant General Counsel,
Interstate Commerce Commission.

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